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May 13, 2019

Ex Parte Notice

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Petitions for Declaratory Ruling Filed by BellSouth and Alabama 911 Districts Regarding the Meaning of the Commission's Definition of Interconnected VoIP in 47 C.F.R. § 9.3 and the Prohibition on State Imposition of 911 Charges on VoIP Customers in 47 U.S.C. § 615a-1(f)(1),* WC Docket No. 19-44

Dear Ms. Dortch:

On May 9, 2019, Christopher Heimann and the undersigned (in person) and Heather Randall (telephonically), all of AT&T, along with Scott Angstreich and Jeremy Newman (Kellogg, Hansen, Todd, Figel & Frederick, P.L.L.C.) representing AT&T, met with Terri Natoli, Michael Ray, Pamela Arluk, and Michele Berlove of the Wireline Competition Bureau. During the meeting, AT&T discussed BellSouth's petition for declaratory ruling and AT&T's comments and reply comments in the above captioned matter.

AT&T reiterated its position that the Commission should declare that where a voice service is transmitted over the last mile in a format other than IP (such as Time Division Multiplexing (TDM)), it cannot qualify as interconnected VoIP under 47 C.F.R. § 9.3. AT&T explained that, while the Alabama Districts have abandoned their previous position that certain TDM voice services are actually interconnected VoIP, Phone Recovery Services and other plaintiffs in 911 charge litigation have maintained that position.

AT&T also reiterated its position that the Commission should interpret 47 U.S.C. § 615a-1(f)(1) to preempt state and local 911 charge statutes and ordinances that adopt discriminatory rules for billing 911 charges to customers of interconnected VoIP service and non-VoIP telephone services, whether that discrimination occurs through different per unit charges or different rules for calculating the total number of 911 charges a VoIP and a non-VoIP customer must pay. That interpretation is consistent with the text of the statute, with its legislative history,[1] and with Congress's and the Commission's policy of promoting broadband deployment and the transition to IP-based services.

As AT&T discussed at the meeting, several ways exist by which a state or locality could adopt a facially discriminatory state 911 charge statute. First, a state statute could cap the total

[1] *See* H.R. Rep. No. 110-442 at 15 (2007) (explaining that § 615a-1(f)(1) prevents states and localities from imposing 911 charges on VoIP customers that "exceed fees imposed or collected from" non-VoIP customers and giving, as an "example" of a way a state or locality could violate the statute but not the sole way, setting different per unit rates for VoIP and non-VoIP customers).

number of 911 charges that non-VoIP customers could be required to pay each month, while imposing no cap on the total number of 911 charges that VoIP customers could be required to pay each month. AT&T noted that the South Carolina counties that filed 911 collection lawsuits alleged that South Carolina's 911 statute operates in precisely that manner, claiming that non-VoIP customers must pay no more than fifty 911 charges per month — no matter what quantity of service they purchase — but VoIP customers may be required to pay thousands of 911 charges each month.[2] Second, a state statute could require non-VoIP customers to pay 911 charges based on the number of simultaneous 911 calls they could dial, but require VoIP customers to pay one 911 charge for each telephone number they obtain, even if the customer's VoIP service does not allow all of those telephone numbers to be used simultaneously to dial 911. AT&T noted that the Districts allege that Alabama's prior 911 statute operated in just that manner.[3] While there may be other ways in which a state or locality could discriminate against VoIP customers and VoIP services, those are the two ways plaintiffs in the pending 911 charge litigation have alleged that state 911 statutes operate.

AT&T reiterated that it is not asking the Commission to interpret any state's 911 statute nor to decide that any specific 911 statute is preempted. Rather, the Commission should exercise its authority to interpret the federal statutes that it administers and declare the meaning of § 615a-1(f)(1). The courts in the various 911 charge litigations can then interpret the relevant state statutes and can resolve any ambiguities by invoking the canon in favor of construing statutes, wherever possible, to avoid preemption by federal law. And, in the unlikely event that a court concludes that a state has adopted a facially discriminatory 911 charge statute, the court can hold that the statute is preempted by § 615a-1(f)(1).

AT&T also noted that, in recent years, many states have amended their 911 statutes to adopt explicit provisions that treat VoIP and non-VoIP services in a non-discriminatory manner. This includes multiple states in which 911 charge litigation has been filed, such as Alabama, Georgia, and Pennsylvania. None of the cases in those states, however, include claims that telephone companies violated the amended statutes.

Alabama: As amended effective in 2013, Alabama's 911 statute defines "[v]oice [c]ommunications [s]ervice" to include both traditional wireline service and interconnected VoIP service. Ala. Code § 11-98-1(a)(18). It provides that "[a] single, monthly statewide 911 charge shall be imposed on each active voice communications service connection in Alabama that is technically capable of accessing a 911 system." *Id.* § 11-98-5(a). Alabama's 911 Board then promulgated a rule clarifying that the same method of counting active voice communications

[2] AT&T also noted that, in that litigation, it has disputed that interpretation of South Carolina's 911 Act.

[3] AT&T also noted that, as explained in its reply comments (at 6), an Alabama state court has rejected that reading of Alabama's 911 Act, finding that it required both VoIP and non-VoIP customers to pay 911 charges based on the number of simultaneous calls they can dial.

service connections — "the number of channels configured for or capable of accessing a 9-1-1 system" — applies to both VoIP and non-VoIP services. Ala. 911 Board Rule 585-X-4.01.

Georgia: The Georgia 911 statute imposes a 911 charge "per telephone service provided to the telephone subscriber." Ga. Code Ann. § 46-5-134(a)(1)(A)(i). As a result of a 2018 amendment, the "telephone service" subject to 911 charges explicitly includes both "local exchange access facilities" and "Voice over Internet Protocol service." 2018 Ga. Laws Act 436 (H.B. 751). The statute now provides that, when a customer purchases a telephone service with "the voice channel capacity to make more than one simultaneous outbound call . . . , then each such separate outbound call voice channel capacity, regardless of technology, shall constitute a separate telephone service." Ga. Code Ann. § 46-5-122 (16.1(B)).

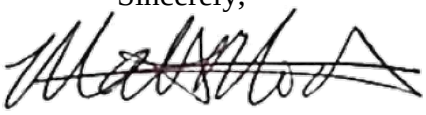
Pennsylvania: As amended effective in 2015, Pennsylvania's 911 statute imposes a monthly "surcharge of $1.65 for each 911 communications service . . . for which that subscriber or consumer is billed by a provider or seller," and provides that "[t]he surcharge shall be uniform, competitively neutral and in an equal amount for subscribers or consumers of all 911 communications services." 35 Pa. Stat. and Cons. Stat. Ann. §§ 5306.2(a), 5306.2(a)(1). The statute defines "911 communications service" broadly to include (among other things) traditional wireline service and interconnected VoIP service. *Id.* § 5302. VoIP customers must pay 911 charges on each "VoIP service line[] for which the VoIP provider has enabled the capacity for simultaneous outbound calls regardless of actual usage." *Id.* § 5307(b)(7). Similarly, customers buying digital transmission links at the DS-1 level, such as PRI service, must pay "23 surcharges per transmission link," *id.* § 5307(b)(6), which also reflects the simultaneous calling capacity.

AT&T further explained that it agreed with numerous commenters that, if the Commission interprets § 615a-1(f)(1) to preempt all state statutes and local ordinances that facially discriminate against VoIP services and VoIP customers, that ruling will moot the disputes in the pending 911 charge litigation concerning whether certain services do or do not meet the definition of interconnected VoIP in § 9.3. In the various 911 charge litigations, the vast majority of plaintiffs' claimed damages stem from two related assertions: (1) the applicable 911 statute imposes a facially discriminatory rule for billing 911 charges on VoIP and non-VoIP customers, and (2) services that telephone companies sell and consumers purchase as traditional non-VoIP wireline service (such as PRI) are actually interconnected VoIP services under § 9.3. Plaintiffs in the 911 charge litigation are thus raising the second argument only because they also contend that reclassifying those services would subject the customers and telephone companies to the discriminatory 911 charge rule for VoIP services. That second argument would be moot if the Commission correctly interprets § 615a-1(f)(1) to preempt such facially discriminatory state statutes and local ordinances.

Finally, AT&T stressed the need for prompt action in resolving these petitions for declaratory ruling. In the South Carolina litigation, the district court ruled today that it could not resolve as a matter of law whether that state's 911 statute imposes the starkly discriminatory 911 charge rule that plaintiffs contend — capping non-VoIP customers at fifty 911 charges per month (irrespective of quantity), but leaving VoIP customers potentially subject to thousands of

monthly 911 charges — without first engaging in "a fact-based review of . . . how each Defendant configures its services."[4] That case is currently scheduled to go to trial in November 2019. And, on May 13, 2019, the district court in that case held that it could not resolve whether the state 911 statute applies a 50-charge cap only to non-VoIP services. While the Florida litigation is subject to a primary jurisdiction stay, Phone Recovery Services (which is directly or indirectly the source of all of this litigation) is urging the Florida court to restart those cases, asserting that the Commission's ruling could be years away. Moreover, the 911 statutes at issue in both of those cases remain in effect, so that a court ruling adopting the plaintiffs' interpretation of those state laws and finding that § 615a-1(f)(1) does not preempt such an interpretation would increase the 911 charges VoIP customers must pay on a going forward basis, discouraging — and perhaps reversing — the adoption of IP-based voice services and broadband deployment.

Sincerely,



Matt Nodine
AT&T Services Inc.

cc: Terri Natoli
Michael Ray
Pamela Arluk
Michele Berlove

[4] Order at 4-5, *County of Richland v. AT&T Corp.*, No. 3:18-cv-1295-RMG (D.S.C. May 13, 2019) (Ex. A). Defendants had argued that, by making the 911 charge on "*each* VoIP service line" "in an amount identical" to the "amount of the 911 charge imposed on *each* local exchange access facility," South Carolina unambiguously extended the 50-charge cap on non-VoIP services to VoIP services (the 911 charge on the 51st local exchange access facility is $0, therefore the 911 charge on the 51st VoIP service line must also be zero). S.C. Code Ann. § 23-47-67(A)-(B) (emphases added). Defendants further argued that, if the state statute were ambiguous, the court should construe it to apply the cap to both types of service because otherwise § 615a-1(f)(1) would preempt South Carolina's 911 statute. The court suggested that resolving the meaning of the South Carolina 911 statute required determining whether "the phrase 'an amount' refers to the total quantity or combined value of [911] charges to the customer, rather than to the individual per-charge rate." Order at 4. That, however, is the dispute about the meaning of § 615a-1(f)(1), which is a pure question of law that turns on Congressional intent and as to which the Commission receives deference. It is not a question of fact about how any telephone company configures its services.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

County of Richland, South Carolina, Plaintiff, v. AT&T Corp., *et al.*, Defendants.	Civil Action No. 3:18-1295-RMG **ORDER**

Before the Court is Defendants' joint motion for judgment on the pleadings on two counterclaims. (Dkt. No. 69.) For the reasons set forth below, the motion is denied.

I. Background

The South Carolina 911 Act authorizes local governments such Richland County to adopt an ordinance imposing monthly charges on telephone consumers in order to fund local 911 call centers. *See* S.C. Code Ann. § 23-47-10 *et seq*. Plaintiff adopted such ordinances. *See* Richland Cnty. Ord. § 2-139(5)(a). (Dkt. No. 38 ¶¶ 28-29.) The companies providing telephone service to consumers in the jurisdiction bill the 911 charges to their consumers, collect the charges from the consumers, and remit the amount to the local government minus a 2% administrative fee. *See* S.C. Code Ann. §§ 23-47-40, 50.

Richland County alleges that Defendants, the telephone service providers, violate the 911 Act, among other claims, by under-charging their consumers the 911 charge and, as a result, under-remitting the charge to Richland County, which results in inadequately funded 911 call centers and a potential public safety concern. Plaintiff seeks to enforce its implied private right of action under the 911 Act and brings claims for (i) violation of the South Carolina Unfair Trade Practices Act, (ii) violation of the 911 Act, (iii) breach of statutory duty, (iv) breach of fiduciary

duty, (v) negligence and negligence *per se*, and (vi) constructive fraud. Richland County also seeks a declaratory judgment, a permanent injunction, and punitive damages. (Dkt. No. 38.)

II. Legal Standard

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). Rule 12(c) motions "dispose of cases in which there is no substantive dispute that warrants the litigants and the court proceeding further." *Lewis v. Excel Mech., LLC*, 2:13-CV-281-PMD, 2013 WL 4585873 at * 1 (D.S.C. Aug. 28, 2013) (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 1368 (3d ed. 2010)). A judgment on the pleadings is only warranted if "the moving party has clearly established that no material issue of fact remains to be resolved and the party is entitled to judgment as a matter of law." *Id.* at *2 (quoting *Park Univ. Enters. v. Am. Cas. Co.*, 442 F.3d 1239, 1244 (10th Cir. 2006)).

A Rule 12(c) motion limits the Court's review to the pleadings, *Abell Co. v. Balt. Typographical Union No. 12*, 338 F.2d 190, 193 (4th Cir. 1964), and to "any documents and exhibits attached to and incorporated into the pleadings," *Lewis*, 2013 WL 4585873 at *1 (citing *Eagle Nation, Inc. v. Mkt. Force, Inc.*, 180 F. Supp. 2d 752, 754 (E.D.N.C. 2001)). Like a motion to dismiss under Rule 12(b)(6), the Court must construe the pleadings on a Rule 12(c) motion in a light most favorable to the non-moving party. *Burbach Broad. Co. v. Elkins Radio Corp.*, 278 F.3d 401, 405–06 (4th Cir. 2002). Accordingly, "[t]he court must accept all well pleaded factual allegations in the non-moving party's pleadings as true and reject all contravening assertions in the moving party's pleadings as false." *Lewis*, 2013 WL 4585873, at *2 (quoting *John S. Clark Co., Inc. v. United Nat'l Ins. Co.*, 304 F. Supp. 2d 758, 763 (M.D.N.C. 2004)).

III. Discussion

Defendants[1] seek a judgment granting two of their counterclaims to the Amended Complaint, described in their instant motion as: (1) the counterclaim for declaratory judgment that the 911 Act caps the number of 911 charges that any customer must pay at fifty charges per account, per month; and (2) the counterclaim for declaratory judgment resolving the parties' disputes about the meaning of S.C. Code. Ann. § 23-47-50(a)(a)-(b), which applies to a "local exchange access facility that is capable of simultaneously carrying multiple voice and data transmission," commonly referred to as a "multiplex service." (Dkt. No. 69 at 6.) More specifically, looking to the pleadings themselves, each defendant counterclaimed as follows:

AT&T, BellSouth Telecommunications, LLC and Teleport Communications America, LLC together brought one counterclaim for declaratory judgment (1) that the 911 Act requires multiplex service customers to pay five 911 charges where the customer can modify the number of transmission paths without the service provider's assistance (hereafter, the "First Declaration"); (2) that the 911 Act requires VoIP customers to pay one 911 charge for each simultaneous outbound voice call that the customer can place using that service (hereafter, the "Second Declaration"); and (3) that the 911 Act caps at fifty the number of charges that any customer must pay per month, per account (hereafter, the "Third Declaration"). (Dkt. No. 45 at 32.)

Sprint Communications Company, L.P. (Dkt. No. 49 at 29) and Level 3 Communications, LLC, Level 3 Telecom of South Carolina, LLC, and Telecove Operations, LLC (collectively,

[1] The Defendants moving for judgment on the pleadings on their counterclaims are: AT&T Corp.; BellSouth Telecommunications, LLC; Teleport Communications America, LLC; Telcove Operations, LLC; Level 3 Communications, LLC; Level 3 Telecom of South Carolina, LLC; DeltaCom, LLC, US LEC of South Carolina LLC; Windstream Nuvox, LLC; and Business Telecom, LLC.

"the CenturyLink Defendants") (Dkt. No. 51 at 30) each brought one counterclaim for the First Declaration, Second Declaration and Third Declaration. Windstream Nuvox, LLC, US LEC, DeltaCom, LLC, and Business Telecom, LLC (collectively, "the Windstream Defendants") together brought one counterclaim for declaratory judgment seeking only the Second Declaration and the Third Declaration. (Dkt. No. 48 at 28.)[2] No counterclaim was pleaded by YMAX Communications Corp. (Dkt. No. 44), Bandwidth Inc. and Bandwidth.com CLEC, LLC (Dkt. No. 50), or MCI Communications Services, Inc. (Dkt. No. 52).

Reviewing the counterclaims pleaded in a light most favorable to Richland County, as the non-moving party, the Court finds there remain material issues of fact to be resolved. The Court cannot find on the counterclaims as pleaded that the 911 Act requires multiplex service customers to pay five charges when the customer can modify the number of transmission paths without the service provider's help, because the term "multiplex," for example, is a term of art that requires a factual understanding of the telecommunications industry and the technical nature of services provided. Nor can the Court find on the pleadings that the 911 Act imposes a monthly cap of fifty charges per account. Defendants may contend that the cap expressly applied to non-VoIP lines by § 23-47-50(A) (". . . total number of 911 charges remains subject to the maximum of fifty 911 charges per account . . .") also applies to VoIP lines by virtue of reference in § 23-47-67(A) ("There is hereby imposed a VoIP 911 charge in an amount identical to the amount of the 911 charge imposed on each local exchange access facility . . ."). This inquiry implicates whether the phrase "an amount" refers to the total quantity or combined value of charges to the customer, rather than to the individual per-charge rate. The required analysis,

[2] Defendants' motion states that all moving Defendants, including the Windstream Defendants, seek a judgment on a counterclaim relating to multiplex service charges. But because the Windstream Defendants did not plead a counterclaim for the First Declaration, they are not entitled a judgment on it here.

therefore, goes beyond any legal question that could be disposed of on the pleadings and instead requires a fact-based review of, for instance, how each Defendant configures its services.

Relatedly, the Court cannot declare on the counterclaims as pleaded that, as a matter of law, the 911 charge is a "tax" that requires any ambiguity in the 911 Act to be resolved in favor of the "taxpayer." Defendants rely in part on the Georgia Supreme Court's recent holding in *Bellsouth Telecommunications, LLC, et al. v. Cobb County, et al.*, 2019 WL 654174, at *7 (Ga. Feb. 18, 2019) that the Georgia 911 statute is a tax precluding recovery under common law tort and that the statute does not provide a private right of action. (Dkt. No. 89.) However, the *Cobb County* court noted that the Georgia Court of Appeals had remanded back to the trial court for a record to be developed beyond what was available on the motion to dismiss in order to determine whether the charge was a fee or a tax as a matter of law. 2019 WL 654174, at *2. Chief Judge Dillard similarly noted in his concurrence to the decision from the Court of Appeals that whether the charge is a tax was "not dispositive" of those counties' claims because the counties were "not suing a taxpayer for the recovery of taxes," but rather "assert a *statutory claim* under [the 911 Act] for violation of a legal duty, as well as common-law claims to recover *damages* resulting from alleged negligence, fraud, and breach of fiduciary duty." 802 S.E.2d 686, 701 (Ga. Ct. App. 2017) (emphasis in original).

Here, construing the counterclaims in the same light as did the *Cobb County* court on a Rule 12(b) motion, the Court concludes that judgment as a matter of law on the counterclaims is not warranted. Rather, the 911 Act repeatedly refers to its cost as a "charge" (*see, e.g.*, S.C. Code Ann. §§ 23-47-10(1), 23-47-50(A)), whereas the legislature chose to use the label "tax" in reference to a levy other than the 911 charge (*see, e.g.*, *id.* § 23-47-50(F) ["Fees collected by the service supplier pursuant to this section are not subject to any tax, fee, or assessment, nor are

they considered revenue of the service supplier."]). Moreover, the 911 charge is alleged to be used for the specific purpose of defraying particular 911 call center costs, which other courts have an identified as indication of a "charge" and not a "tax." *See, e.g.*, *T-Mobile South, LLC v. Bonet*, 85 So. 3d 963, 984 (Ala. 2011); *see also BellSouth Telecomms, Inc. v. City of Orangeburg*, 522 S.E.2d 804 (S.C. 1999) ("Generally, a tax is an enforced contribution to provide for the support of government, whereas a fee is a charge for a particular benefit to the payer."). This Court also previously held that the South Carolina 911 Act provides Plaintiff with an implied private right of action. (*Cnty. of Charleston, S.C. v. AT&T Corp., et al.*, 2:17-cv-2534-RMG, Dkt. No. 86).

As a result, the Court declines to declare on the counterclaims as pleaded that the 911 Act caps each account's charges at charges at fifty per month, nor the meaning of S.C. Code. Ann. § 23-47-50(a)(a)-(b) as it pertains to particular multiplex service charges.

IV. Conclusion

For the foregoing reasons, Defendants' joint motion for judgment on the pleadings on two counterclaims (Dkt. No. 69) is **DENIED**. Because the Court does not require oral arguments on the issues raised by the motion for judgment on the pleadings, Defendants' consent motion for a hearing (Dkt. No. 77) is **DENIED**.

AND IT IS SO ORDERED.

Richard Mark Gergel
United States District Court Judge

May 13, 2019
Charleston, South Carolina